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86-5504

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ORIGINAL

GLORIA RODRIGUEZ, a/k/a "CARMEN SANTIAGO," Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOEL B. RUDIN, ESQ.
Counsel of Record for Petitioner
666 Fifth Avenue
New York, New York 10103
(212) 307-6307

Of Counsel:

Brian Sheppard
44 Route 25A
Smithtown, N.Y. 11787
(516) 360-0477

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39 pp

QUESTION PRESENTED

Should this Court abandon the model of statutory construction it has used for the last decade, placing primary importance on the plain meaning of the language of a statute and on other well-known canons of statutory interpretation, and replace it with the model which the court below employed: a rejection of the canons, including the plain meaning rule, in favor of an attempt to divine and carry out the unwritten, broad policy choices of Congress implicit in the statutory scheme?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GLORIA RODRIGUEZ, a/k/a "CARMEN SANTIAGO," Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Gloria Rodriguez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 19, 1986 (petition for rehearing and rehearing en banc denied August 5, 1986).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 749 F.2d 24, and is reprinted in the appendix hereto, pp. 1a-6a, infra.

The United States District Court for the Southern District of New York (Lasker, D.J.) wrote no opinion in this case. The transcript of Judge Lasker's oral conclusions of law relevant to this petition is reprinted in the appendix hereto, pp. 7a-10a, infra.

JURISDICTION

Judgment was entered against petitioner in the United States District Court for the Southern District of New York on July 9, 1985. On June 19, 1986, on respondent's

appeal, the United States Court of Appeals for the Second Circuit vacated that judgment and remanded the case to the District Court for resentencing. The Court of Appeals denied a timely petition for rehearing and rehearing en banc on August 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

18 U.S.C. § 3651 (1982) [first paragraph]. Suspension of sentence and probation.

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

18 U.S.C. § 3147 (Supp. III 1985). Penalty for an offense committed while on release.

> A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to--
>
> (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or
>
> (2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.
>
> A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

STATEMENT OF THE CASE

On April 3, 1985, petitioner was arrested for selling three glassine envelopes containing cocaine in New York City. The following day, she was arraigned on a complaint before a United States Magistrate for the Southern District of New York, and was released on a $2,000 personal recognizance bond.

On April 16, 1985, she was indicted for the sale and possession of the cocaine. The following day, while on release on the earlier case, she was arrested for selling four glassine envelopes containing heroin in New York City.

The United States District Court for the Southern District of New York (Lasker, J.) took jurisdiction of both cases pursuant to 18 U.S.C. § 3231 (1982). On April 25, 1985, petitioner pled guilty to one count of the indictment, which charged her with distributing cocaine near a high school. 21 U.S.C. §§ 812, 841 (a)(1), 841 (b)(1)(B), and 845a(a) (1982 and Supp. III 1985).

On June 13, 1985, an information was filed against petitioner in connection with the second arrest. On that same day, she pled guilty to one count of the information, charging possession of heroin with intent to distribute. 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(B) (1982 and Supp. III 1985).

At sentencing on July 9, 1985, Judge Lasker stated that petitioner, a mother of four who he was "prepared to believe" had committed these street-level drug sales because of her own drug addiction, should serve a total of four months in prison for the offenses.[1] Respondent argued that

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1 In addressing petitioner at sentencing, the court said the following:

> Now, there are a lot of things in your favor too and I want to consider them before I impose sentence. You do come from or grew up in impoverished circumstances and you left your home at the age of 13 and only met your own father when you were 10 years old, as I understand it. You have been a good mother and in spite of all the obstacles you faced when you were young, you have been able to see to it that one of your daughters goes to college. Your consensual spouse, the man you live with, is an epileptic and he has problems getting jobs. You have been to school only through the fifth grade. You have some trouble, health troubles with your heart and you have been, at least until you were put into custody here, a substantial user of narcotics yourself and I am prepared to believe that what you did had to do with supporting your habit. Finally, thank God, although

18 U.S.C. § 3147 (Supp. III 1985) mandated at least a two-year prison sentence because it provided that a person convicted of a felony committed while on release "shall be sentenced to ... a term of imprisonment of not less than two years." However, relying upon the Probation Act, 18 U.S.C. § 3651 (1982), which states that a suspended sentence and probation are available for "any offense (emphasis added) not punishable by death or life imprisonment," Judge Lasker sentenced petitioner to a prison term of four months on the cocaine conviction, and, suspending sentence on the heroin and section 3147 convictions, to two consecutive periods of two years' probation to follow the prison term.[2]

Respondent appealed to the Second Circuit, arguing that Congress, in enacting section 3147, intended that probation not be available to a person convicted of committing a felony while on release, section 3651 notwithstanding. Petitioner answered that, although section 3147 requires that a person who commits a felony while on release be sentenced to a prison term of at least two years, nothing in that section conflicts with section 3651, which permits suspension of sentence and probation for "any offense not punishable by death or life imprisonment." Petitioner further argued that, aside from the plain meaning rule, other canons of statutory construction, as well as the legislative history, supported her position. Finally, petitioner asserted that, even if the interplay between the two sections could be considered ambiguous, the rule of lenity required that the district court's construction of

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these sales took place within 1,000 feet of a school, they didn't take place on school premises or sidewalk and they weren't sales to students.

2 The transcript of Judge Lasker's oral conclusions of law at the sentencing proceeding are reprinted in the appendix hereto, pp. 7a-12a, infra.

the statutes be upheld.

The Second Circuit, in reversing the District Court, essentially sidestepped petitioner's arguments. 749 F.2d at 26-29. Instead, it totally recast the issue as follows:

> [T]he critical issue here is not merely the presence or absence of certain words, but whether Congress evinced an intention to supersede the Probation Act [section 3651]. The objective of statutory interpretation is to interpret the idea that Congress intended to convey by a statute, not merely to interpret the words of a statute.

Id. at 26. The court then ruled that, since two goals of the Comprehensive Crime Control Act of 1984 -- of which section 3147 was a part -- were to deter the commission of crimes by defendants on pre-trial release and to limit judicial discretion in sentencing, Congress must have intended section 3147 to require imprisonment for all persons committing additional crimes committed while on pre-trial release. Id. at 26-28.[3]

Petitioner timely petitioned the Second Circuit for rehearing and rehearing en banc, arguing that the panel's opinion, by focusing upon the "idea" of the statute, had ignored settled canons of statutory construction which, had they been followed, would have required a contrary result.

On August 5, 1986, the Second Circuit denied that motion, with none of the judges requesting that the case be reheard.[4]

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3 The opinion below is reprinted in the appendix hereto, pp. 1a-6a, and is discussed in considerably more detail in the next section of this petition (Reasons for Granting the Writ).

4 The order denying rehearing and rehearing en banc is reprinted in the appendix hereto, p. 13a, infra.

REASONS FOR GRANTING THE WRIT

THE CIRCUIT COURT'S OPINION ADVANCES A MOVEMENT IN THE LOWER FEDERAL COURTS LOOKING TO THE "IDEA" OF A STATUTE RATHER THAN USING TRADITIONAL CANONS OF STATUTORY CONSTRUCTION TO DIVINE CONGRESSIONAL INTENT; CERTIORARI SHOULD BE GRANTED TO ADDRESS THIS CHALLENGE TO THE SUPREME COURT'S JURISPRUDENCE OF STATUTORY CONSTRUCTION

A. Members of the Federal Judiciary Have Been Accepting a Scholarly View Which Rejects This Court's Strict Constructionism of Federal Statutes in Favor of an Activist Role for Federal Judges in Construing Congressional Intent.

Strict construction is the watchword of this Court's interpretation of federal statutes. Time-honored canons of statutory construction are the Court's primary tools to determine Congressional intent. Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv.L.Rev. 892, 892-98 (1982).

The Court begins statutory analysis with the language chosen by Congress; the "plain meaning" of such language is then given primary importance in determining legislative intent. Consumer Product Safety Counsel v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (unanimous opinion). Supplementing the "plain meaning rule" are other canons: Congress is presumed to be familiar with judicial precedent and to expect a new enactment using similar language to be similarly construed;[5] Congress is presumed to act purposefully when it uses certain language in one section of a statute but omits that language or uses different language in another section of the same or a similar statute;[6] ambiguity in the construction of a penal

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5 Cannon v. University of Chicago, 441 U.S. 677, 699 (1979); Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) (unanimous opinion).

6 Russello v. United States, 464 U.S. 16, 23 (1983)

statute should be resolved in favor of the defendant (the rule of lenity).[7] These canons are supplemented, in divining Congressional intent, by the legislative history of the statute in question.[8]

This Court has relegated to a back seat policy principles not written into the words of the statute. Note, supra, 95 Harv. L.Rev. at 892-98. Indeed, where "the language of a provision ... is sufficiently clear in its context and not at odds with the legislative history," such policy considerations are deemed irrelevant. Aaron v. SEC, 446 U.S. 680, 695 (1980).

However, a scholarly movement embraced by an apparently growing number of Circuit Court judges advocates a radically different approach to statutory construction. This movement's adherents argue in essence that Congress, being neither omniscient nor perfect, frequently does not anticipate problems of statutory construction nor appreciate how its actions will be construed. The "intent" of Congress reduced through use of traditional tools of statutory construction may thus be fictional, frustrating rather than implementing the broad purposes of the statute. E.g., Posner, Statutory Interpretation -- in the Classroom and in the Courtroom, 50 Chi. L. Rev. 800, 805-17 (1983) (hereinafter "Posner"); Note, supra, 95 Harv. L. Rev. at 899-907.

(unanimous opinion); Aaron v. SEC, 446 U.S. 680, 697 (1980); Touche Ross & Co. v. Redington, 442 U.S. 560, 571-72 (1979); United States v. Naftalin, 441 U.S. 768, 773 (1979) (8-0 opinion); see Andrus v. Glover Construction Co., 446 U.S. 608, 616-17 (1980) (unanimous opinion).

7 Bifulco v. United States, 447 U.S. 381, 387, 400 (1980); Busic v. United States, 446 U.S. 398, 406 (1980).

8 Dawson Chemical Co. v. Rohn & Haas Co., 448 U.S. 176, 204 (1980); United States v. Enmons, 410 U.S. 396, 404-05 and n. 14 (1973).

In Judge Posner's view, the canons of statutory construction basically should be scrapped; instead, a judge interpreting a statute should engage in "imaginative reconstruction." Posner, at 806-07, 816-17. "The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar." Id. at 817. A court construing a statute should look less to its actual language and more to its overall "likely purpose." Id. at 808.[9]

Not long after he ascended to the Seventh Circuit bench, Judge Posner, dissenting from the denial of a motion for rehearing en banc, wrote:

> Legislators cannot foresee and solve in advance all the problems that will arise in the practical administration of the statutes they enact. The judicial duty of statutory interpretation is not merely to read; it is a duty to help the legislature achieve the aims that can reasonably be inferred from the statutory design, and it requires us to pay attention to the spirit as well as the letter of the statute.

United States v. Markgraf, 736 F.2d 1179, 1188 (7th Cir. 1984), cert. dismissed, ___ U.S. ___, 105 S. Ct. 1154 (1985).

Judge Posner has not been the only circuit judge to favor this position. In United States v. Torres, 751 F.2d 875, 887 (7th Cir. 1984) (Cudahy, J., concurring in result), cert. denied sub. nom. Rodriguez v. United States, ___ U.S. ___, 105 S. Ct. 1853 (1985), a colleague of Judge Posner relied on Posner's Markgraf dissent and Chicago Law Review

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9 An approach similar to Judge Posner's advocates that the federal courts should find the policy principles implicit in federal statutes and then extend those principles into a body of federal common law. G. Calabresi, A Common Law for the Age of Statutes (1982); Note, supra, 95 Harv. L. Rev. at 913-14.

article to support an "'aggressive' and 'imaginative'" construction of a federal statute.[10] And in Chemical Bank v. Arthur Anderson & Co., 726 F.2d 930 (2d Cir.), cert. denied, ___ U.S. ___, 105 S. Ct. 253 (1984), the late Judge Friendly, who provided "helpful comments" on Judge Posner's Chicago Law Review article[11] and whom Judge Posner referred to as one of the most notable "debunk[ers]" of the canons of statutory construction, Posner, at 800 n.+, 801 and n. 6, returned the compliment. In Chemical Bank, the issue was the significance of Congress' use of different language in one statutory section "obviously drawn from" another statute enacted one year earlier. 726 F.2d at 941-42. Judge Friendly found no significance in the differentiation, reasoning:

> Courts sometimes err in attributing substantive importance to what may well have been a draftsman's choice of slightly different language. As Judge Posner has observed, "omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process" [citing Posner, at 811].

726 F.2d at 942.

B. The Court Below Employed the Posner Approach, Reaching a Different Result Than It Would Have Reached Had It Used This Court's Method of Statutory Interpretation.

Judge Posner's view was embraced by the Second Circuit in this case, leading to a result it could not logically have reached had it followed the traditional

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10 Judge Posner, who wrote the majority opinion in Torres, disagreed with Judge Cudahy that, under the facts of that case, a Congressional purpose broader than that explicitly stated in the statute could be inferred. 751 F.2d at 885-86.

11 Associate Justice-nominee Antonin Scalia also provided "helpful comments" on the article. Posner, at 800 n.+.

statutory analysis required by this Court.[12] The Circuit Court did not explicitly state that it was doing so. But an analysis of how this Court might have approached the issue, compared to the way the Second Circuit did, makes its endorsement of the Posner view crystal clear.

Whether a violater of 18 U.S.C. § 3147 can receive a suspended sentence and be placed on probation is a question answerable under the "plain meaning" rule. The Probation Act, 18 U.S.C. § 3651, provides that "[u]pon entering a judgment of conviction of any offense not punishable by death or life imprisonment, ... [the] court ... may suspend the imposition or execution of sentence and place the defendant on probation." Section 3147 provides that a violator "shall be sentenced (emphasis added) ... to a term

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12 Guided by traditional statutory analysis, the government in United States v. Mudd, No. 86-3007 (D.C. Cir.), a case presenting the identical issue as here, initially conceded that probation was available under Section 3147 and moved the Circuit Court to remand for resentencing because the district judge had refused to consider probation under Section 3147. The government reasoned:

> Upon review of the statute, its legislative history, and the manner in which Congress in other statutes has expressed its intent to require a "true mandatory" minimum sentence of incarceration, we have concluded that the district court erred in determining that it had no choice under the statute except to impose a term of incarceration. While the statute did require the court to impose a mandatory minimum sentence of not less than two years, it did not require a mandatory minimum term of incarceration. That is, the court retained the discretion, pursuant to 18 U.S.C. § 3651, to suspend execution of the sentence in favor of probation.

Motion to Remand for Resentencing, July 22, 1986, at 2, reprinted in the appendix hereto at 14a to 16a.

However, after learning of the Second Circuit's decision in this case, the government withdrew its concession and submitted a brief in opposition to the appellant, relying entirely upon Rodriguez. Mudd is scheduled to be argued in the District of Columbia Circuit on October 17, 1986.

of imprisonment of not less than two years and not more than ten years if the offense [committed while on release] is a felony." It does not provide for a sentence of death or life imprisonment, nor does it state that its 2-to-10-year sentence cannot be suspended and the defendant placed on probation. In sum, the plain meaning of the statutory language of the two sections, read together, is that violators of Section 3147 are eligible for probation.

The plain meaning of the statutory language is reinforced by other canons of construction. Congress must be presumed to have known when it enacted section 3147 in 1984 that the Probation Act, enacted in 1925, had been judicially construed to apply to all subsequent legislation "unless specifically made inapplicable" and that even a provision that a violator "shall be imprisoned (emphasis added) for twenty-five years" would not suffice. United States v. Donovan, 242 F.2d 61, 62, 64 (2d Cir. 1957).[13] See Cases cited at p. 6, n.5, supra.

This presumption is reinforced by the repeated manifestations of Congressional understanding of the Donovan rule. Prior to 1984, Congress several times used express language, as Donovan required, to supersede the Probation Act.[14] Several sections of the Comprehensive Crime Control Act of 1984 (hereinafter "the Act"), Pub. L. No. 98-473, title II, 98 Stat. 1976, of which section 3147 is a part,

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13 See Jones v. United States, 419 F.2d 593, 597-98 (8th Cir. 1969) (Blackmun, J.); see also Andrews v. United States, 373 U.S. 334, 340 (1963); United States v. Davis, 560 F.2d 144, 148 (3d Cir.), cert. denied, 434 U.S. 839 (1977); United States v. Wilson, 506 F.2d 521, 522 (9th Cir. 1974); United States v. Cameron, 351 F.2d 448, 449 (7th Cir. 1965); United States v. Hardaway, 350 F.2d 1021, 1022 (6th Cir. 1965); Smith v. United States, 284 F.2d 789, 791 n.2 (5th Cir. 1960).

14 18 U.S.C. § 924(b) (1982), amended, Pub. L. No. 98-473, title II, § 1005(a), 98 Stat. 2138; 21 U.S.C. § 848(c) (1982 and Supp. III 1985).

include the same or similar language.[15] Donovan's requirement of express statutory language to preclude probation is even incorporated into the new probation section.[16] Finally, the Act's legislative history makes explicitly clear that Congress wrote these sections knowing of Donovan.[17] Since Congress was actually aware of how the courts had interpreted statutes which did not explicitly supersede the Probation Act, it must be presumed that Congress expected section 3147, which also lacked any such language, to be similarly interpreted. Lorillard v. Pons, 434 U.S. 579, 581-82 (1978)(unanimous opinion). Such a conclusion is also compelled by an additional canon of construction: when Congress uses certain language in one

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15 Pub. L. No. 98-473, title II, §§ 503(a), 1005(a), 1006(a), and 1802, 98 Stat. 2069, 2138, 2139, and 2185 (codified at 21 U.S.C. § 845a(c), 18 U.S.C. §§ 924(c), 929(a), and 18 U.S.C. app. § 1202(a) (Supp. III 1985)).

16 Under the Act, effective November 1, 1987, existing Section 3651 is repealed; under new Section 3561, probation will be available unless the offense is an "A" or "B" felony or "is an offense for which probation has been expressly precluded." Pub. L. No. 98-473, title II, §§ 212(a)(2), 235(a)(1), 98 Stat. 1992, 2031, as amended, Pub. L. No. 99-217, § 4, 99 Stat. 1728 (codified at 18 U.S.C. § 3561(a)(2) (Supp. III 1985)).

17 The Senate Report on the bill noted that "[m]ost statutes that specify minimum sentences do not create mandatory minimum sentences of confinement since they do not preclude the suspension of sentence, or the placement of the defendant on probation or parole." S. Rep. No. 225, 98th Cong., 2d Sess. 66 n.129 (hereinafter "S. Rep. No. 225"), reprinted in 4 U.S. Code Cong. & Ad. News 3147, 3249 (1984). Similarly, the report indicated that 18 U.S.C. § 924(c)(1982) as it then read allowed for a suspended sentence and probation despite the provision therein that a violator of that section "shall ... be sentenced to a term of imprisonment of not less than one year nor more than ten years" for a first conviction. The report stated that different language had to be used to preclude suspended sentences and probation for violators of the section. S. Rep. No. 225, at 312-13, reprinted in 4 U.S. Code Cong. & Ad. News, at 3490-91 (1984). Congress then did amend section 924(c) to satisfy the Donovan requirement. Pub. L. No. 98-473, title II, § 1005(a).

section of a statute but omits that language or uses different language in another section of the same or a similar statute, the differentiation is presumed to be purposeful. See cases cited at pp. 6-7, n.6., supra.

Finally, at the very least the statutory language and legislative history were sufficiently ambiguous to require application of the rule of lenity. See cases cited at p. 7, n.7, supra.

Following the Posner model, the Second Circuit in this case substantially ignored the established canons of construction. The opinion below did not acknowledge that statutory interpretation must begin with the statutory language, which is given primary importance in divining Congressional intent. The opinion neither set forth nor analyzed the language of section 3651, and noted the language of section 3147 almost as an afterthought.[18] The Circuit Court did not discuss the significance of Congress' differentiation in its choice of statutory language in different sections of the same or similar statutes; the presumption that Congress is aware of judicial precedent and expects a new enactment to be similarly construed; or the affirmative evidence that Congress, in enacting section 3147, actually was aware of the broad judicial construction of the Probation Act and the judicial requirement that an intention to supersede it be explicitly stated in the

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18 As to the language of section 3147, the court stated that the words "'shall be sentenced ... to ... a term of not less than two years'" would be rendered nugatory unless they were construed to prohibit imposition of probation. 794 F.2d at 28. This position is illogical; as with virtually all federal statutes, a person can "be sentenced (emphasis added) ... to ... a term of not less than two years" pursuant to section 3147 but have that sentence suspended and receive probation pursuant to section 3651. See cases cited at p. 11, n.13, supra.

statutory language.[19]

Instead of employing the canons of statutory construction, the opinion below began:

> [T]he critical issue here is not merely the presence or absence of certain words, but whether Congress evinced an intention to supersede the Probation Act [section 3651]. The objective of statutory interpretation is to interpret the idea that Congress intended to convey by a statute, not merely to interpret the words of a statute.

794 F.2d at 26. The court then examined Section 3147 in the context of the Act "as a whole." It found that Congress had been guided by two overriding policy principles not written into Section 3147: crimes committed by defendants on pre-trial release must be deterred, and judicial discretion in sentencing must be limited. Id. at 26-28. In light of these broad policy objectives, the court concluded, Congress must have intended that persons who commit felonies while on release spend at least two years in prison.[20] In sum, by

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19 The court did mention the rule of lenity, but found it inapplicable, since "both the statute and the legislative history are clear and unambiguous." 794 F.2d at 29. This position was quite predictable, since the rule of lenity would seem to have no place in the Posner model. See pp. 17-18, infra.

20 The only legislative history that even arguably supports the result reached by the Second Circuit below consists of two passing references to the prison terms provided by section 3147 as being "mandatory." See 794 F.2d at 27-28. For several reasons, this history deserves little if any weight.

First, the term "mandatory," in reference to prison sentences, is hopelessly ambiguous, as a "mandatory" sentence of imprisonment can be imposed but then suspended, whereas an "absolutely" or "truly" "mandatory" prison sentence cannot be suspended and must be served. See cases cited at p. 11, n.13, supra. Second, one of the passing references was hardly indicative of Congressional intent, as it was made by an employee of the Congressional Budget Office in a report to the Senate Judiciary Committee on the budgetary effects of the Act. S. Rep. No. 147, 98th Cong., 1st Sess. 66-67 (1983). See S & E Contractors, Inc. v. United States, 406 U.S. 1, 13-14 n.9 (1972); McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 493-94 (1931) (unanimous opinion). The other passing reference, while made by one of the many cosponsors of the Act, occurred

employing "imaginative reconstruction" under the Posner model, the Second Circuit reached the opposite result from that which a traditional statutory construction analysis would have yielded.

C. This Case Represents a Rare Opportunity to Consider the Propriety of Judge Posner's Approach Before It Is Adopted by an Unacceptably Large Percentage of the Federal Bench.

The opinion below demonstrates the dangers inherent in "imaginative reconstruction." Judge Posner too readily dismisses the potential criticism of this approach that judges will "assume that the legislators were people just like themselves, so that statutory construction will consist of the judge's voting his own preferences and ascribing them to the statute's draftsmen." Posner, at 817.

First, the unwritten policy principles underlying a statutory scheme may be elusive. Here, although the Circuit Court acknowledged two such principles, it somehow managed not to recognize two additional principles also underlying the Act which clearly militated against the result the court reached: disfavor with mandatory minimum prison terms unless explicitly required by express statutory language,

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years before when he introduced a predecessor bill that was rejected by a different Congress; moreover, there were no references in the later Congress that enacted similar legislation to that Senator's earlier remarks. 127 Cong. Rec. S 8923 (daily ed. July 31, 1981) (remarks of Sen. Thurmond). Contrast the cases cited at p. 7, n.8, supra. Finally, these isolated, ambiguous, passing references hardly constitute the type of contemporaneous, precise analyses of the bill's language by its sponsors necessary to justify overriding the clear meaning of the words in the instant statutes. Regan v. Wald, 468 U.S. 222, 236-37 (1984); Weinberger v. Rossi, 456 U.S. 25, 34-35 (1982); S & E Contractors, Inc., supra, 406 U.S. at 13-14 n.9; NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116, 129 n.24 (1971) (unanimous opinion).

and a preference for alternative, non-prison sentences for nonviolent offenders to preserve scarce prison resources.[21] Indeed, in United States v. Torres, supra, in which Judge Posner wrote the majority opinion, a unanimous decision was not reached because the concurring judge divined an unstated Congressional policy in a statute while the majority did not. Compare United States v. Torres, supra, 751 F.2d at 885-86 (Posner, J.) with id. at 887 (Cudahy, J., concurring in result).

Second, even where judges agree on what policy principles underly a statutory scheme, these principles may conflict. Mere personal preference may then determine which principles are given the most weight. Here, had the court below divined the two additional policy principles discussed in the preceding paragraph, the "imaginative reconstruction" necessary to resolve how Congress would have wanted the issue in this case resolved would have amounted to pure speculation.

Third, even assuming, as did the court below, that the underlying policy principles were not in conflict, the judges' personal preferences or speculation may still determine how the principles apply to the specific statutory issue at hand. Here, considering that the Act continued the existing rule under 18 U.S.C. §3651 that probation is available for most offenses unless explicitly precluded,[22] the legislators' general desire to limit sentencing discretion hardly implied a specific wish to extinguish

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21 Pub. L. No. 98-473, title II, §§ 212(a)(2), 239, 98 Stat. 1992, 2039 (codified at 18 U.S.C. § 3561 (Supp. III 1985)); S. Rep. No. 225, at 59, 89 n.194, reprinted in 4 U.S. Code Cong. & Ad. News, at 3242, 3272 n.194.

22 Pub. L. No. 98-473, title II, §§ 212(a)(2), 235(a)(1), and 238(b), (c), & (g)(1), 98 Stat. 1992, 2031, and 2038-39 (codified at U.S.C. § 3561(a)(2) (Supp. III 1985) and 18 U.S.C. § 3651 (1982 and Supp. III 1985)).

probation in the application of Section 3147.[23] Likewise, Congress' felt need to deter defendants from committing crimes while on release is satisfied by the threat of additional imprisonment for such offenses. See Shuman v. Wolff, 791 F.2d 788, 795-96 (9th Cir. 1986)("the availability of the death penalty for the prisoner serving a life term without the possibility of parole is a sufficient deterrent," and thus a "mandatory" death penalty in such a case is not "necessary" [emphasis added]). It does not necessarily follow that, to carry out its overall purpose, Congress would have intended that, no matter how mitigating a particular offender's circumstances, at least two years' additional imprisonment would be required.

Finally, "imaginative reconstruction" in the penal context leaves no room for the rule of lenity. By assuming that every issue of statutory construction may be resolved by reference to general policy principles divined by an omniscient judiciary, the Posner model conveniently resolves ambiguity in the language of the statute or in the legislative history which this Court has taught should be resolved in favor of a criminal defendant. See p. 13, n.18, supra. There could be no better proof of the ambiguity in this statute than the Government's own concession, in United States v. Mudd, No. 86-3007 (D.C. Cir.), that the statutory

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23 Indeed, if Congress considered it vital to ensure that everyone who commits a felony while on release serve at least two years in prison, why did Congress at the same time it enacted section 3147 provide that, effective November 1, 1987, the "mandatory" minimum prison sentence provision of section 3147 would be repealed, thus allowing those who thereafter commit felonies while on release to be sentenced to probation? Pub. L. No. 98-473, title II, §§ 203(a), 212(a)(1), 223(g)(1), and 235(a)(1), 98 Stat. 1983, 1992, 2028, and 2031, as amended, Pub. L. No. 99-217, § 4, 99 Stat. 1728 (codified at 18 U.S.C. §§ 3147, 3561(a) (Supp. III 1985)).

language and legislative history of section 3147 demonstrate an intent to permit probation. This concession was withdrawn because of the Second Circuit's decision in Rodriguez relying upon the "idea" of the overall legislative enactment as opposed to the traditional tools of statutory construction which establish, at the very least, ambiguity. See p. 10, n. 12, supra.

This case presents the Court with a rare opportunity to stem the growth of "imaginative reconstruction" in the federal courts. A court using the Posner model is unlikely to do so explicitly, in view of this Court's contrary jurisprudence; indeed, such a court is likely to at least pay lip service to the traditional canons.[24] Here, because the Circuit Court's holding was so patently unjustifiable under this Court's approach, it had no choice but to implicitly embrace "imaginative reconstruction" to provide some reasoned basis for its decision. Besides permitting the Court to review a decision that will directly affect thousands of criminal defendants sentenced under section 3147,[25] the granting of certiorari in this case will permit

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24 In the above-cited examples of federal judges explicitly advocating the Posner approach, see pp. 8-9, supra, the nature of their opinions made it highly unlikely that this Court would review their decisions. In Chemical Bank v. Arthur Anderson & Co., supra, 726 F.2d at 942-45, Judge Friendly, while relying in part on Judge Posner's approach, relied as well on reasoning well within the mainstream of this Court's jurisprudence of statutory interpretation. Judge Posner's opinion in United States v. Markgraf, supra, 736 F.2d at 1188, was an opinion dissenting from the denial of a rehearing en banc, while Judge Cudahy's opinion in United States v. Torres, supra, 751 F.2d at 887, was a concurring opinion.

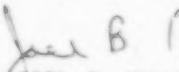
25 The Congressional Budget Office estimated prior to the enactment of section 3147 that more than 1,500 persons per year would be subject to the "mandatory" provisions of that section. S. Rep. No. 147, 98 Cong., 1st Sess. 66-67 (1983). Thus, despite the repeal of the minimum sentencing provision of section 3147 effective November 1, 1987, see p. 17, n.23, supra, thousands of persons would be affected by this Court's reversal of the

the Court to stem the growth of the Posner model before it is adopted by additional courts undetected.

CONCLUSION

For the reason stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



JOEL B. RUDIN
Counsel of Record for Petitioner
666 Fifth Avenue
New York, New York 10103
(212) 307-6307

Of Counsel:

Brian Sheppard
44 Route 25A
Smithtown, New York 11787
(516) 360-0477

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judgment below.

This case has even further broad applicability. The Second Circuit below, 794 F.2d at 28-29, seemingly rejected its prior position in Donovan that a statute merely requiring a sentence of imprisonment does not "explicitly ma[k]e inapplicable" the broad probation provision of section 3651. United States v. Donovan, supra, 242 F.2d at 64. Therefore, the Second Circuit is likely to be in conflict with the other circuits adhering to Donovan, see cases cited at p. 11, n.13, supra, when section 3651 is replaced on November 1, 1987, by a new probation statute permitting probation unless "the offense is an offense for which probation has been expressly precluded," Pub. L. No. 98-473, title II, §§ 212(a)(2), 235(a)(1), 98 Stat. 1992, 2031, as amended, Pub. L. No. 99-217, § 4, 99 Stat. 1728 (codified at 18 U.S.C. § 3561(a)(2) (Supp. III 1985)).

APPENDIX

mittedly not as effective as mandatory deadlines, such a notice would be of assistance to the class, most of whom "are not represented by counsel and are unaware of what remedies they have to challenge unreasonable delays in the disposition of their claims." *Martinez v. Califano*, supra, slip op. at ——. In *Martinez*, Judge Nickerson ordered the Secretary to provide notice to claimants awaiting hearings advising them of procedures available in the event of unreasonable delay. Slip op. at 5. See also *Blankenship v. Secretary of Health and Human Services*, No. C 75-0185-L(A), slip op. at 4 (W.D.Ky. March 20, 1986) (also requiring notice). Indeed, notice is probably the remedy most likely to facilitate individual suits of the type referred to approvingly in footnote 33 of *Heckler v. Day*. We anticipate that the parties will work out the specific form and timing of the notice on remand, subject to the district court's approval.

[7] Status reports would also be useful to identify particular instances of delay. See *Sharpe v. Heckler*, supra, slip op. at 12–13 (ordering parties to work out consensual reporting); *Caswell v. Bowen*, —— F.Supp. ——, Civ. No. 76-25, slip op. at 3–4, (D.Me. Jan. 16, 1986) (ordering Secretary to report statistical information). Since appellants do not provide us with a detailed plan for this relief, we recommend to the district court the approach taken by Judge Haight in *Sharpe*, supra, slip op. at 13–14, and suggest that the parties arrive at some sort of consensual reporting requirement which could also serve as the basis for giving particularly delayed cases priority and expedited treatment. If agreement cannot be reached quickly, however, it would be within the district court's power to order the filing of reports, the establishment of priorities and the expediting of delayed cases on an individual basis.

For the reasons stated above, we reverse the orders of the district court in relevant part, and remand the cases for consideration of appropriate class-wide relief.

UNITED STATES of America, Appellant,

v.

Gloria RODRIGUEZ, a/k/a "Carmen Santiago", Defendant-Appellee.

Nos. 530, 531, Dockets 85–1323, 85–1324.

United States Court of Appeals, Second Circuit.

Argued Nov. 26, 1985.

Decided June 19, 1986.

Government appealed from judgment entered in the United States District Court for the Southern District of New York, Morris E. Lasker, J., sentencing defendants to two years' probation under Bail Reform Act of 1984. The Court of Appeals, Pierce, Circuit Judge, held that Bail Reform Act of 1984 mandated imposition of two-year minimum term of imprisonment upon defendants convicted of committing offense while on release.

Vacated and remanded for resentencing.

Criminal Law ⇐982.4(1)

Bail Reform Act of 1984 mandated imposition of two-year minimum term of imprisonment upon defendants convicted of committing offense while on release, so that sentencing judge could not impose term of probation. 18 U.S.C.A. §§ 3141 et seq., 3147.

Henry Pitman, Asst. U.S. Atty., New York City (Rudolph W. Giuliani, U.S. Atty., for S.D.N.Y., Warren Neil Eggleston, Asst. U.S. Atty., New York City, of counsel), for appellant.

Joel B. Rudin, New York City, for defendant-appellee.

Before TIMBERS, PIERCE and MINER, Circuit Judges.

PIERCE, Circuit Judge:

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge*, under which defendants were sentenced, *inter alia*, to two years probation under 18 U.S.C. § 3147. The government's appeal challenges this sentence contending that under § 3147 a two-year minimum term of imprisonment was mandated and that the district court erred in imposing a term of probation.

The Comprehensive Crime Control Act of 1984 provides the context for interpreting the Congressional intent embodied in the Bail Reform Act, generally, and in § 3147 specifically. Based upon this contextual foundation, we conclude that, by enacting § 3147, Congress intended to redefine the sentencing judge's authority and to limit the judge's exercise of discretion. We conclude that imprisonment was mandated and consequently, we vacate the judgment and commitment order and remand to the district court for resentencing.

BACKGROUND

The facts herein are not in dispute. On April 3, 1985, Gloria Rodriguez, the appellee, was arrested in New York City for selling cocaine to an undercover police officer. She was arraigned and then released on a personal recognizance bond.

Two weeks later, Rodriguez was arrested again in New York City, this time for selling heroin to an undercover police officer.

In each instance, she was charged with making the sale within 1000 feet of a public school.

A three count indictment was filed based on the first arrest; a two count information was filed based on the second arrest. The two cases were assigned to Judge Lasker who accepted pleas from Rodriguez as follows: plea of guilty to Count One of the indictment which charged distribution of cocaine near a public school, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(B), 845a, and 18 U.S.C. § 2; plea of guilty to Count Two of the information which charged possession of heroin with intent to distribute, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(B)—each is a federal felony.

On July 9, 1985, Rodriguez was sentenced on each of these two charges. Rodriguez was sentenced on Count One of the indictment to a term of four months' imprisonment and six years' special parole; and on Count Two of the information imposition of sentence was suspended and she was placed on probation for two years to follow release from custody. Then, acknowledging that he found the issue "far from clear" and citing the rule of lenity, Judge Lasker concluded that the court had the power to suspend the two year minimum term of imprisonment required by Section 3147 [1] and to impose a term of probation. He then proceeded under § 3147 to suspend imposition of sentence and to place Rodriguez on probation for a further period of two years.

DISCUSSION

Chapter I of the Comprehensive Crime Control Act of 1984 is entitled the Bail Reform Act of 1984 ("the Bail Act") and includes 18 U.S.C. § 3147. Generally, the Bail Act addresses the process by which defendants are released or detained pending trial, sentencing, or appeal. It also provides for additional penalties for failure to appear, for violation of a release condition, and, under § 3147, for committing an offense while on release.

The government contends that the district court had no power to suspend the mandatory two year minimum term of im-

1. Section 3147 provides:

> A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—
>
> (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony....
>
> A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

prisonment required under 18 U.S.C. § 3147; that the language of the statute is clear and the legislative history is unambiguous and, hence, the rule of lenity does not apply; and that § 3147 supersedes the Probation Act, 18 U.S.C. § 3651.

Appellee's primary contention is that § 3147 requires a mandatory minimum *sentence*, not *imprisonment*, and probation may be granted pursuant to 18 U.S.C. § 3651, since no explicit reference to the Probation Act was made by Congress in § 3147 and, further, that this omission suggests that Congress had no intention of superseding the provisions of the Probation Act. Appellee also argues that the rule of lenity applies, thus seeking to invoke the maxim of statutory construction which provides that any ambiguity concerning the reach of a penal statute must be resolved in a defendant's favor.

As for the plain language of § 3147, appellee's claim is that the language of the statute does not go far enough, that certain restrictive language must be included in a federal criminal sentencing statute in order to override the provisions of the Probation Act. However, the critical issue here is not merely the presence or absence of certain words, but whether Congress evinced an intention to supersede the Probation Act. The objective of statutory interpretation is to interpret the idea that Congress intended to convey by a statute, not merely to interpret the words of a statute.

In determining the Congressional intent embodied in § 3147, it is important to consider the Comprehensive Crime Control Act of 1984 as a whole. The fact of passage of such far-reaching legislation strongly suggests that there was an intent to overhaul and supersede many aspects of the federal criminal justice system. It is also apparent that Congress intended to address two specific matters: criminal activity during the pre-trial release period and the unrestricted discretion of sentencing judges.

The legislative history reflects a clear Congressional intent to address the problem of the escalating number of crimes perpetrated during the pre-trial release period. Senator Strom Thurmond in introducing S. 1554, 97th Cong., 1st Sess. (1981), a predecessor to the 1984 Bail Reform Act, stated:

> Behind the economy, fear of crime is becoming the No. 1 social issue. One reason, in my opinion, for the continuing growth of crime in America is the practice of releasing arrested defendants back into the community prior to trial.... *Too often, those individuals are simply rearrested or found to have committed additional crimes before going to trial on the initial charge.... This legislation is intended to address this serious problem in our present criminal justice system.*

127 Cong.Rec. S. 19015 (daily ed. July 31, 1981) (remarks of Sen. Thurmond) (emphasis added). Similarly, in discussing S. 1554, Senator Kennedy expressed a strong concern over the rate at which *defendants in pending cases were being rearrested* and "charged with serious felonies—especially burglary, robbery, larceny, and drug offenses". *Id.* at 19020 (remarks of Sen. Kennedy).

In addition, both the Senate and House committees on the judiciary took note of the significant rearrest rate of charged defendants. In 1983, the Senate Committee on the Judiciary expressed such concerns in considering amendments to the Bail Reform Act of 1966:

> ... the 1966 Act drew criticism particularly in the District of Columbia where all crimes formerly fell under the regulation of Federal bail law. In a considerable number of instances, persons accused of violent crimes committed additional crimes while released on their own personal recognizance. Furthermore, these individuals were often released again on nominal bail.

S.Rep. No. 147 at 8; *see also* H.Rep. No. 1121, 98th Cong., 2d Sess., 33, 35 (1984). The conclusion that the rearrest rate had become a serious problem was supported by a report submitted to the Senate Committee by the Department of Justice during

the debate on the Bail Reform Act of 1984. The report stated that:

> In a recent study conducted by the Lazar Institute, one out of six defendants were [sic] rearrested during the pretrial period. Nearly one-third of these persons were rearrested more than once, and some as many as four times.... Among defendants released on surety bond, the form of conditional release reserved for those who are the greater bail risks, the incidence of rearrest reached the alarming rate of twenty-five percent.

Hearing on S. 829 Before the Subcomm. on Criminal Law of the Committee on the Judiciary, 98th Cong., 1st Sess. 119–20 (1983) (Formal Statement of the Department of Justice).

Clearly, Congress intended to address this problem by the enactment of the Bail Reform Act of 1984 and the adoption of provisions, including § 3147, specifically directed toward the deterrence of this type of conduct: section 3142(b), (e), and (g) permit the district judge to consider danger to the community in determining whether release pending trial would be appropriate; section 3148(b)(1)(A) provides for revocation of a release order upon a finding of probable cause that the defendant has committed a crime; and section 3142(h)(2)(A) requires the judicial officer who issues the release order to inform the defendant of "the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release." Indeed, Magistrate Bernikow informed the defendant in this case of the mandatory penalties for both bail-jumping and committing a crime while released on bail.

In introducing S. 1554, 97th Cong., 1st Sess. (1981), the predecessor of the bill later enacted as the Bail Reform Act of 1984, Senator Thurmond stated that such a penalty enhancement provision was intended to deter criminal conduct by released individuals by providing for mandatory prison terms:

> Section [3147] is a new provision that provides mandatory prison terms to run consecutive to any other sentence of imprisonment for the commission of a Federal, State or local offense while released pursuant to this chapter.

127 Cong.Rec. S. 19017 (daily ed. July 31, 1981) (remarks of Sen. Thurmond).

In addition, the reports of the Senate and the House committees on the judiciary stressed that Section 3147 was intended to serve as a deterrent by imposing a mandatory minimum "term of imprisonment" on individuals who commit additional crimes while on pre-trial release:

> Section 3147 is designed to deter those who would pose a risk to community safety by committing another offense when released under the provisions of this title and to punish those who indeed are convicted of another offense. This section enforces the self-evident requirement that any release ordered by the courts include a condition that the defendant not commit another crime while on release. Given the problem of crime committed by those on pretrial release this requirement needs enforcement. Accordingly, this section prescribes a penalty in addition to any sentence ordered for the offense for which the defendant was on release. This additional penalty is a term of imprisonment of at least two years and not more than ten if the offense committed while on release is a felony. If the offense committed while on release is a misdemeanor, this additional penalty is at least 90 days and not more than one year.

S.Rep. No. 147, at 61. *Accord* H.Rep. No. 1121, 98th Cong., 2d Sess. 30–31 (1984); S.Rep. No. 225, 98th Cong., 1st Sess. 34 (1983) *reprinted in* 4 U.S.Code Cong. & Ad.News 3182, 3217 (1984); S.Rep. No. 317, 97th Cong., 2d Sess. 64 (1982).

Finally, in assessing the budgetary impact of the enactment of the Bail Reform Act, both the Senate and the House noted that:

> If an individual is convicted of committing an offense while on release, the bill requires that the individual be imprisoned for an additional period of time, the

length of which varies with the seriousness of the offense.

* * * * * *

The mandatory additional sentence for those individuals convicted of an offense while on release is expected to result in increased federal costs....

S.Rep. No. 147 at 65, 66-67. *See also* H.Rep. No. 1121, 98th Cong., 2d Sess., 33, 35 (1984); S.Rep. No. 225, 98th Cong., 1st Sess. 417 (1983), *reprinted in* 4 U.S.Code Cong. & Ad.News 3182 (1984); S.Rep. No. 317, 97th Cong., 2d Sess. 68, 70 (1982).

It thus appears that, in these instances, Congress intended to limit the discretion of sentencing judges by passage of the Comprehensive Crime Control Act of 1984. Evidence of such intent is embodied in the Sentencing Reform Act of 1984, which is to become effective on November 1, 1987, and which will modify the federal sentencing system by establishing parameters within which district judges are to impose sentences in accordance with published guidelines, which are being drafted by a sentencing commission. *See* Section 217, Pub.L. No. 98-473, Tit. II, Ch. II, § 217, 98 Stat. 2017 (October 12, 1984). Once the guidelines have been adopted, any deviation from what is prescribed therein would permit either the government or the defendant to appeal from a sentence. Also, once these guidelines become effective the mandatory sentence established under § 3147 will automatically be repealed and replaced by the commission's guidelines. *See* Section 235(a), Pub.L. No. 98-473, Tit. II, Ch. II, § 235(a), 98 Stat. 2028 (October 12, 1984). This legislatively designed scheme suggests a linkage between the penalties established for crimes committed while released on bail and the Sentencing Reform Act. While the Probation Act has yet to be repealed by the new statute, it is clear to us from the full context of the Comprehensive Crime Control Act of 1984 and the history of its unenacted antecedents that the term of imprisonment referred to in § 3147 was intended to be mandatory.

Further, Rodriguez' contention that Congress did not intend to provide for a two-year mandatory minimum prison sentence is at odds with the plain language of § 3147 as well as its legislative history. The plain language requires that a person who commits an offense while on pretrial release "shall be sentenced ... to ... a term of not less than two years." The Supreme Court instructed years ago that [Courts]

are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word....

Market Co. v. Hoffman, 101 U.S. (11 Otto) 112, 115-16, 25 L.Ed. 782 (1879).

To us, this means that the express terms of § 3147 should be construed according to their plain meaning and, thus, that this statute requires the imposition of a mandatory minimum term of imprisonment.

We conclude that § 3147 is a punishment-enhancement statute, enacted for the purpose of deterring individuals who were not otherwise being effectively deterred. To hold that § 3147's imprisonment sanction can be suspended would render the statute devoid of the meaning intended by Congress.

The appellee's arguments which suggest that the proper interpretation of § 3147 should be based upon precedents in which a different interpretation was given to statutory penalties passed prior to enactment of the Probation Act or given to statutory penalties passed as parts of statutes designed to penalize certain specific conduct are not really helpful in our interpretation of the statute before this court. *See, e.g., United States v. Becker*, 536 F.2d 471 (1st Cir.1976) (probation available for violators despite statute requiring sentence of "not less than 2 or more than 10 years" for marijuana violation); *United States v. Ortiz*, 488 F.2d 175, 179 (9th Cir.1973) (probation available under the aircraft piracy statute, 49 U.S.C. § 1472(i), despite the statutory requirement that violators "shall be

punished ... by imprisonment for not less than 20 years"); *United States v. Donovan*, 242 F.2d 61 (2d Cir.1957) (finding the 25-year minimum sentence for armed robbery of a post office contained in 18 U.S.C. § 2114 subject to the provisions of the subsequently enacted probation act). Appellee has suggested no case which involved such a comprehensive legislative scheme, designed specifically to address perceived systemic deficiencies in the area of federal criminal justice, as exists here. In our view, the mandatory language of § 3147, considering these specific purposes and the broad context in which it was enacted, represents a Congressional mandate and must be given a literal interpretation.

Appellee argues that the rule of lenity should be applied herein. The district judge also relied upon this rule in reaching his decision. The rule of lenity, which is a maxim of statutory construction, calls for the resolution of ambiguous penal statutes in favor of the defendant. *See, e.g., Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955). However, it is inapplicable where both the statute and the legislative history are clear and unambiguous. This case does not present ambiguous legislation, although it does raise questions regarding the precedential impact of cases which interpreted penal statutes and the Probation Act as providing a discretionary option by a sentencing judge despite specific penal legislation, *see supra*. We have considered these cases and nevertheless conclude that the legislative intent of § 3147 is clear, especially given the broad context of the Comprehensive Crime Control Act of 1984. Therefore, we find the rule of lenity to be inapplicable herein. *United States v. Culbert*, 435 U.S. 371, 379, 98 S.Ct. 1112, 1116–1117, 55 L.Ed.2d 349 (1978) (the rule is not to be used " 'in complete disregard of the purpose of the legislature' ") (quoting *Scarborough v. United States*, 431 U.S. 563, 577, 97 S.Ct. 1963, 1970, 52 L.Ed.2d 582 (1977)).

Vacated and remanded for resentencing.

Brian EATZ, Edward McMillan, Peter Albrechtsen and Sonny Pascale, individually on their own behalf and on behalf of all persons similarly situated, Plaintiffs-Appellants,

v.

The DME UNIT OF LOCAL UNION NUMBER 3 OF the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO; Local Union Number 3 of the International Brotherhood of Electrical Workers, AFL–CIO; and the New York Racing Association, Inc., Defendants-Appellees.

No. 820, Docket 85–7835.

United States Court of Appeals,
Second Circuit.

Argued Feb. 21, 1986.

Decided June 19, 1986.

Union members brought class action against employer, union, and bargaining unit, alleging union breached duty of fair representation in negotiating and administering collective bargaining agreements, and that employer acted in concert with union. The United States District Court for the Eastern District of New York, Mark A. Costantino, J., dismissed, on ground that complaint was time barred, and members appealed. The Court of Appeals, George C. Pratt, Circuit Judge, held that: (1) record revealed postlimitations period events tending to show breach of union's duty of fair representation, and (2) members should have been permitted to amend complaint before district court determined whether action was time barred.

Reversed and remanded.

1. Labor Relations ⇐758

Six-month limitations period applicable to unfair labor practice claims and hybrid cases in which employees sue employer for

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

v. 85 Cr. 347
85 Cr. 535

CARMEN SANTIAGO,

Defendant.

----------x

July 9, 1985

1:45 p.m.

Before:

HON. MORRIS E. LASKER,

District Judge

APPEARANCES

RUDOLPH W. GIULIANI,
United States Attorney for the
Southern District of New York,
HENRY PITMAN,
Assistant United States Attorney

JOEL RUDIN,
Attorney for defendant

SOUTHERN DISTRICT REPORTERS, U.S. COURTHOUSE
FOLEY SQUARE, NEW YORK, N.Y. - 791-1020

(In open court)

(Case called)

THE CLERK: Government ready?

MR. PITMAN: Ready for the government.

THE CLERK: Defendant ready?

MR. RUDIN: Defendant is ready.

THE CLERK: Both sides ready.

THE COURT: Miss Santiago and gentlemen, as you know, this case has been before me a number of times for sentencing because of the legal question that is pending as to whether or not in the circumstances of Miss Santiago's case the recent legislation by Congress requires a two-year minimum sentence to be imposed.

The issue, to begin with, was whether or not the provision which does provide for such a two-year minimum in 18 U.S.C. 3147 was intended by Congress to have been repealed simultaneously with its passage or whether it was intended to be repealed effective two years from its passage, and the government submits a memorandum and Mr. Rudin letters in argument on that point which I decided in the government's favor.

There remains the question, however, which has been raised since as to whether or not even though Section 3147 provides for a two-year minimum to be imposed in the case of someone who, like Miss Santiago, committed a second

offense after conviction but before sentence for the firs
there remains the question whether or not the provision i
intended to preclude the court from imposing a sentence c
probation with regard to the second offense.

I do have two indictments before me, do I not?

THE CLERK: Yes, your Honor.

THE COURT: I was hesitating because I was looking at the papers and only saw reference to one count

Now, I have received from the Administrative Office of the United States Courts and in particular from the office of the general counsel a letter dated July 3, 1985 by Lisa A. Kahn, assistant general counsel, in which she expresses at the conclusion of the letter the followir view of the matter: "In sum, while there is clearly some ambiguity regarding Congress' intent by referring that a specified minimum term of imprisonment be added to the sentence of a defendant convicted of a new offense while i release status, it can perhaps be more persuasively argued that probation can be imposed by the court since the law does not expressly preclude probation as a sentencing option."

Before coming to that conclusion, Miss Kahn cites certain cases which have held that unless a criminal statute expressly precludes the court from imposing probation, the court is authorized to do so and those cases

cited by her are United States v. Hardaway, 350 F.2d 1021 (Sixth Circuit, 1963); United States v. Cameron, 351 F.2d 448, (Seventh Circuit, 1965); and Andrews v. The United States, 373 U.S. 334 at page 340 which is a 1963 case.

I acknowledge that the question of whether or not probation can be imposed under 18 U.S.C. 3147 is not entirely clear. Nevertheless, I believe that in construin the criminal statute it should be construed favorably to the defendant and that it would be unfair for me to impose a two-year mandatory minimum if I thought that it was more likely, as I do, that the construction of the statute permitted the imposition of probation than it would be to do otherwise. Of course, all that I have said with regard to whether or not probation or less than two years should be imposed clearly depends on my discretionary view and informed judgment of what the penalty ought to be, if it ought to be less than two years. I would not impose a penalty of less than two years unless I thought it was justified in the circumstances.

I have previously indicated to counsel in informal discussions in the robing room what my belief was as to what appropriate sentence ought to be in this case if the two-year minimum was not required. It is for that reason that I am prepared to proceed with less argumentation, it seems to me, than we might otherwise need

845(a), which in fact Miss Santiago has been convicted under, which makes it a 30-year crime to sell narcotics within 1,000 feet of a school. Under subsection (c), it explicitly prohibits a court from giving probation or from the defendant being paroled if it is a second offense and if the first judgment had become final before the commission of a second offense. So Congress obviously knew very well how to prohibit probation in this situation. It chose to do that under 845(a) and it chose not to do it under 18 U.S.C. 3147.

THE COURT: Let me make a final observation with regard to legal questions relating to 3147. I have acknowledged before and I acknowledge again in light of the government's argument that the question is far from clear. On the other hand, it is my view of the matter and has been my view of the matter that a fair sentence in Miss Santiago's case is less than two years and I will explain my reasons on the record in a moment. I am faced therefore with the choice of agreeing with the government, which I would do of course if I was entirely persuaded or even more persuaded one way or the other in favor of the government, and imposing a two-year sentence with the possibility that by the time the correctness of my sentence had been determined, Miss Santiago might actually have served more than the sentence which I have in mind for her as fair, if the

two-year minimum does not apply.

Accordingly, I am taking the other course; first because I find the argument in favor of the defendant at least as persuasive as that of the government's; and, secondly, because I recognize that the matter will ultimately have to be decided at a higher level, not just for the purposes of this case but for the purposes of all cases of this nature which will be coming before the courts. I will impose a lesser sentence with the understanding on my part that this may result in the government's seeking a petition for a writ of mandamus in the circumstances and I have no objection if the government does so.

Now, I would like to see counsel at the side bar for a moment so I don't make any errors in the application of the statute even under defendant's construction of it.

(Discussion at the side bar off the record)

THE COURT: Mr. Rudin, is there anything further you want to say?

MR. RUDIN: Your Honor, I would rely upon the letter I submitted to the court and the discussion we have had off the record. I think the court is fully familiar with the facts of the case.

THE COURT: Very good. Miss Santiago, will you stand, please? Miss Santiago, you have the right at this time to tell me anything you want about your case and what

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 5th day of August one thousand nine hundred and eighty- six.

UNITED STATES OF AMERICA,

Appellant,

v.

GLORIA RODRIGUEZ, a/k/a/ "CARMEN SANTIAGO,"

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
AUG 5 1986
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Docket No. 85-1323

A petition for rehearing containing a suggestion that the tion be reheard in banc having been filed herein by counsel for the fendant-Appellee, Gloria Rodriguez, a/k/a Carmen Santiago

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in nc has been transmitted to the judges of the court in regular tive service and to any other judge that heard the appeal and at no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk